Supreme Court, U. S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1978

NO. **78-1132**

WATERBURY PETROLEUM PRODUCTS, INC.
Petitioner

v.

JOHN B. HULL, INC., THE SANDMEYER OIL COMPANY, COMMUNITY PETROLEUM PRODUCTS, INC., AND DUTCHESS AUTO CO.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
1. THE NEED FOR UNIFORMITY OF JUDGMENTS MANDATES THE ISSUANCE OF CERTIORARI	7
2. IN THE AREA OF INJURY TO COMPETITION, THE CASE OF UTAH PIE CO. V. CONTINENTAL BAKING CO., 386 U.S. 685, 696-698, 702 (1967) NEEDS TO BE LIMITED IN ITS HOLDING AND IS CLEARLY DISTINGUISHED FROM THE INSTANT CASE ON THE FACTS	9
3. THE ROBINSON-PATMAN ACT SHOULD NOT BE USED TO FORCE HIGHER PRICES OF FUEL OIL AT A TIME WHEN INEXPENSIVE FUEL OIL IS NECESSARY	9
CONCLUSION	11

CITATIONS

	Page
Cases:	
Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969)	5, 9
FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960)	7, 10
Hampton v. Graff Vending Co., 516 F.2d 100 (5th Cir. 1975).	5, 9
Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir.), cert. denied, 326 U.S. 734 (1945)	3, 5
Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967)	3, 6, 9
Statutes:	
15 U.S.C. §13(a)	passim
28 U.S.C. §1254(1)	2

	Page
Miscellaneous:	
H.R. No. 94-1738, 94th Cong. 2d Sess., Conclusion No. 1 (1976)	8
E. Kintner, A Robinson-Patman Primer (1970)	5
F. Rowe, Price Discrimination Under the Robinson-Patman Act (1962)	10
H. Shniderman, Price Discrimination In Perspective (1977)	8

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The Petitioner, Waterbury Petroleum Products, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Unites States Court of Appeals for the Second Circuit entered in this proceeding on November 30, 1978.

OPINION BELOW

The opinion of the Court of Appeals affirming but modifying the judgment of the U. S. District Court for the District of Connecticut has not yet been reported (App. p.2). The district court "adopted, ratified and confirmed" the recommended ruling of the hearing magistrate, including the findings of fact and conclusions of law therein (App. p. 27).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered November 30, 1978 (App.p.13). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Federal District Court possess the necessary subject matter jurisdiction to hear this case where the claim is price discrimination in violation of 15 U.S.C. §13(A) but where analysis of the parties and market conditions shows that the jurisdictional prerequisite of injury to competition is missing?

2. Should a small retail oil company (Petitioner) that has no unequal advantage or unequal power base, the exercise of which might injure competition, be stopped from marketing fuel oil on a discount basis to consumers by competing oil dealers who service a far greater share of the relevant oil market than Petitioner's 2% share of this market?

(A) Is it time to overrule the presumption of injury to competition, established in the case of Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir.), cert. denied, 326 U.S. 734 (1945), which presumption exists in no other circuit other than the 2nd Circuit?

(B) Should the inference of predatory intent established in the case of Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 696-698, 762 (1967) be strictly limited to cases involving the exercise of an unequal economic power?

STATUTE INVOLVED

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(A) provides in pertinent part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place other than the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such

discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

STATEMENT OF THE CASE

For three generations Waterbury Petroleum Products, Inc. ("WPP") engaged in the retail sale of heating oil in Waterbury, Connecticut. At all times relevant to this controversy, the four Respondents were engaged in this same oil business in an area referred to as the Northwest Corner, encompassing parts of northwest Connecticut, southwest Massachusetts and the adjacent area of New York. Prior to 1975, WPP did not engage in business in the Northwest Corner, but in 1975, WPP purchased the assets, not the stock, of a small oil business in Canaan, Connecticut. The four Respondents sell approximately 50% of the 20 million gallons of fuel oil sold annually in this market area while WPP sells only 2% of the oil sold in this area. All of the companies were classified as "mom-pop" type oil businesses by the trial judge.

Shortly after acquiring the Canaan business, WPP's Canaan employees left to go with a Northwest Corner competitor and a competitor took possession of WPP's Canaan terminal and bulk tanks. WPP began to lose many customers in this market area.

In September of 1976, WPP sought to reverse its declining fortunes in the Northwest Corner by discounting the price of heating oil 9 cents per gallon. WPP would reduce the price 4 cents per gallon by not servicing the oil burners of customers. In addition, WPP offered a prompt payment discount of 5 cents per gallon. WPP analogized this change to a new pricing policy to a full service gas station changing to a self-service gas station. The new pricing policy proved successful in recapturing old customers and acquiring new ones.

The Respondents, not pleased with the low price per gallon WPP charged for fuel oil in the Northwest Corner, brought this action alleging that WPP's pricing policy violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(A). A Preliminary Injunction was issued by the District Court enjoining WPP from discounting from its base price for prompt payment and/or lack of provision for burner service. WPP appealed the issuance of the injunction, claiming that the Court lacked subject matter jurisdiction in that the jurisdictional prerequisite of injury to competition had not been and could not be shown and that the injunction was too broad.

The Court of Appeals for the Second Circuit affirmed but modified the District Court's decision. It rejected the reasoning of the Fifth Circuit in Hampton v. Graff Vending Co., 516 F.2d 100, 101-102 (5th Cir. 1975) and Cliff Food Stores Inc. v. Kroger, Inc., 417 F.2d 203, 208 (5th Cir. 1969). See also, Earl A. Kintner, A Robinson-Patman Primer, P. 35 (1970). In discussing injury to competition, the Court relied upon the often critized case of Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir.),

cert. denied, 326 U.S. 734 (1945), which is the law of only the Second Circuit, and the Court further relied upon the case of Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 696-698, 702 (1967) which is clearly distinguishable on the facts.

The result in this case was to force WPP to charge a higher price per gallon for fuel oil to its consumers and to expose other small businessmen to the same threat of an expensive lawsuit by larger businesses attempting to use the federal courts to fix prices. An analysis of the market conditions, the parties, and the legislative history of the statute show that the Court lacks subject matter jurisdiction in this case and that the matter should be dismissed for that reason.

REASONS FOR GRANTING THE WRIT

Novel and important questions of subject matter jurisdiction and federal statutory construction are presented in this case. This enforcement of the Robinson-Patman Act (15 U.S.C. 13 (A)) has resulted in a direct conflict between the Second Circuit and all of the remaining Circuit Courts of Appeals; in addition, a conflict in the reasoning between the Fifth Circuit Court of Appeals and the Second Circuit Court of Appeals in the area of subject matter jurisdiction has arisen. An answer to these questions will substantially assist the courts in achieving a uniformity of treatment of this federal statute. The importance of this case is dramatized by the fact that the case involves a small retail oil dealer attempting to discount the price of heating oil to his customers at a time when the price of oil is escalating. The lower court's decision undermines the purpose and meaning of this

statute in that it is now being used by a group of oil dealers to force the courts to effectively fix prices and to hurt the small businessman. A Supreme Court decision favorable to the Petitioner will void all previous proceedings and future Robinson-Patman Act proceedings in this matter will be unnecessary. A decision by the Supreme Court, even if unfavorable to the Petitioner, will assist the Court in the trial of this matter as the issues set forth in this Petition necessitate decisions that are fundamental and necessary to the further conduct of this case. An immediate favorable decision will enable small businessmen in the county to lower prices for their products without fearing expensive litigation.

1. THE NEED FOR UNIFORMITY OF JUDGMENTS MANDATES THE ISSUANCE OF CERTIORARI.

A. The Decision Below involves the reliance by the Court of Appeals on the "Moss Rule" whereby the Respondents' burden of showing anti-competitive effect is satisfied upon the mere showing of difference in price. This rule is not followed in any other Circuit.

Price discrimination for purposes of the Robinson-Patman Act is "merely a price difference." FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960). As the Court of Appeals states on page 449 of its opinion, "In this circuit, proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts the burden of proving that its acts did not substantially lessen competition. Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir.), cert. denied, 326 U.S. 734 (1945)."

The holding of the Moss case puts the Second Circuit in conflict with every other Circuit Court of Appeals. "The Second Circuit Court of Appeals, however, in Moss and subsequent cases mistakenly indicates that the burden shifts under Section 2(b) merely upon proof of a price discrimination." (Emphasis supplied.) H. Shniderman, Price Discrimination In Perspective, p. 26 (1977). The Petition should be granted to eliminate the present direct conflict among the Circuits and to secure a uniformity of judgments.

B. The Fifth Circuit has indicated that injury to competition is a jurisdictional prerequisite but the Court below elected not to follow this line of reasoning, creating a conflict with the legislative history of the Act and a probable conflict between the Circuits.

Review of the legislative history of this Act reveals that the purpose of this statute was to encourage small business to compete fully and to protect small business from the larger, more powerful competitors. "The final jurisdictional requirement under Section 2(a) of the Robinson-Patman Act -- the likelihood of competitive injury -- emphasizes that only those discriminations likely to have a substantial adverse effect upon competition are prohibited. This requirement reconciles the Act with Congressional anti-trust policy embodied in the Sherman Act and other anti-trust statutes." H.R. No. 94-1738, 94th Cong. 2d Sess., Conclusion No. 1, page 121 (1976).

Concerning this element of "injury to competition," in this case, the Court of Appeals stated clearly that the Fifth

Circuit "explicitly described [it] as a prerequisite to jurisdiction. Hampton v. Graff Vending Co., 516 F.2d 100, 101-102 (5th Cir. 1975)." However, the Court below chose not to follow this reasoning.

The confusion between the legislative history, the above cited Hampton case, other Fifth Circuit cases such as Cliff Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 208 (5th Cir. 1969), and the ruling in the Court below should be eliminated and a uniformity of reasoning established between the Circuits on this important jurisdictional issue.

2. IN THE AREA OF INJURY TO COMPETITION, THE CASE OF UTAH PIE CO. V. CONTINENTAL BAKING CO., 386 U.S. 685, 696-698, 702 (1967) NEEDS TO BE LIMITED IN ITS HOLDING AND IS CLEARLY DISTINGUISHED FROM THE INSTANT CASE ON THE FACTS.

In the Utah Pie case the defendants were three national baking concerns with huge economic power, huge marketing divisions and huge capital. The use of the inference of predatory intent from proof of sales below cost should be limited to cases where such inequality in economic power exists. It should not bind the small businessman who has little or no economic power while acting on his own.

3. THE ROBINSON-PATMAN ACT SHOULD NOT BE USED TO FORCE HIGHER PRICES UPON SMALL BUSINESSMEN AND TO FIX HIGHER PRICES OF FUEL OIL AT A TIME WHEN INEXPENSIVE FUEL OIL IS NECESSARY.

A. The legislative history of this statute demands that this case be dismissed for lack of subject matter jurisdiction. The guiding principle in the area of

judicial intervention in private business pricing is that "§2(a) must be used in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with the substantial impairment of the vigor or the health for the contest of business, regardless of which competitor wins or loses." Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961). (Emphasis added.)

Frederick Rowe cites that the Senate Judiciary Committee's "guiding ideal" as it considered this legislation was the preservation of equal opportunity and the preservation of the public's freedom from monopoly. Frederick Rowe, Price Discrimination Under the Robinson-Patman Act, p. 20 (1962).

A thorough study of this legislative history, the purpose and language of the Act requires the dismissal of this case for lack of subject matter jurisdiction.

B. This is a case of first impression. If the Court of Appeals' decision is not overruled, actions filed by competitors seeking to fix higher prices will not be subject to a Motion to Dismiss for lack of subject matter jurisdiction and the Petitioner will be forced either to settle the case by raising his prices or to spend large sums of money to litigate the matter. The decision below is therefore harmful to all consumers and all small businessmen.

The high price of heating oil is creating a crisis in the Northeast region of this country and yet the Court of Appeals' decision requires the Petitioner

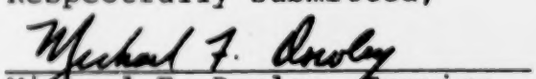
to increase its Northwest Corner price by many cents per gallon.

A decision on this issue should be made as soon as possible for the benefit of consumers of fuel oil in the region. Such a decision would give an impetus to fuel oil dealers to offer new alternatives to their customers in terms of different discount pricing alternatives. This crisis in the price of fuel oil and the pressure of inflation demand an immediate hearing. If Petitioner is successful, the lawsuit will be dismissed. Even if Petitioner is not successful, these questions must still be answered to assure fundamental and necessary fairness in the further court proceedings.

CONCLUSION

Because the rights of all small businessmen depend on this Court's immediate review and because the decision below deprives consumers of a lower price for heating oil, which they would immediately receive should this action be dismissed, and in order to achieve a uniformity of decisions among the Circuits, the Petitioner prays that an immediate Writ of Certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully Submitted,



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INDEX TO APPENDIX

Page

1. Opinion on Appeal from Order Granting Preliminary Injunction, United States Court of Appeals for the Second Circuit, dated November 30, 1978 1

2. Judgment, United States Court of Appeals for the Second Circuit, dated November 30, 1978 13

3. Ruling on Motion for Preliminary Injunction, United States District Court for the District of Connecticut, Clarie, D.J., dated February 14, 1978 14

OPINION

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 21—August Term, 1978.

(Argued October 18, 1978
Decided November 30, 1978.)

Docket No. 78-7136

JOHN B. HULL, INC., THE SANDMEYER OIL COMPANY, COMMUNITY PETROLEUM PRODUCTS, INC., AND DUTCHESS AUTO CO.,

Plaintiffs-Appellees,

—v.—

WATERBURY PETROLEUM PRODUCTS, INC.,

Defendant-Appellant.

Before:

SMITH, TIMBERS AND VAN GRAAFEILAND,

Circuit Judges.

Appeal from order of the United States District Court for the District of Connecticut, T. Emmet Clarie, *Chief Judge*, in a civil antitrust action granting preliminary injunction which required Waterbury Petroleum Products, Inc. to establish single price for sales of heating oil. Modified and affirmed.

MICHAEL F. DOWLEY, MIDDLETOWN, CONN.
(Dzialo, Pickett & Allen, P.C., Middletown Conn.),
for Appellant

JAMES R. HAWKINS, II, STAMFORD, CONN.
(Cummings & Lockwood, Stamford, Conn.),
for Appellee.

SMITH, *Circuit Judge:*

This is an appeal from an order in a civil antitrust action granting a preliminary injunction against defendant's pricing practices for heating oil, entered in the United States District Court for the District of Connecticut, T. Emmet Clarie, *Chief Judge*. We find the scope of the order somewhat broader than justified, modify the order and, as modified, affirm.

This controversy involves five companies engaged in the sale of heating oil (also known as "fuel oil Number 2") to homes, schools and some businesses in an area referred to as the Northwest Corner, which encompasses parts of northwest Connecticut, southwest Massachusetts and the adjacent area of New York. [1] On one side of the controversy are John H. Hull, Inc., The Sandmeyer Oil Company Community Petroleum Products, Inc., and Dutchess Auto Company ("the plaintiffs"). Together they account for a substantial portion of the sales of heating oil in the Northwest Corner.[2] On the other side is Waterbury Petroleum Products, Inc. ("WPP"), which has about 2% of the market in the Northwest Corner.

WPP originally operated exclusively in Waterbury,

Connecticut, outside of the Northwest Corner. In 1975, it purchased the assets of the Canaan Oil Company, located in Canaan, Connecticut, and thereby expanded its business into the Northwest Corner. For reasons unrelated to this action, all three former employees of the Canaan Oil Company subsequently left WPP and began working for one of its competitors. As a result, WPP started to lose customers in the Northwest Corner. At about the same time, WPP lost the use of its Canaan storage facility in a dispute over the ownership of the property.

In September 1976, WPP sought to reverse its declining fortunes in the Northwest Corner by lowering the price of heating oil there to 35.9 cents per gallon. WPP continued to sell its heating oil in the Waterbury area at a price of 40.9 cents per gallon. Over the next four months, increases in the cost of obtaining oil caused WPP to raise the price charged to Waterbury customers to 48.9 cents per gallon. During the same period, WPP only increased its price in the Northwest Corner to 39.9 cents per gallon.

WPP's new pricing policy proved successful in recapturing old customers and acquiring new ones, some of whom previously purchased oil from the plaintiffs. As might be expected, the plaintiffs were not pleased with the loss of customers that WPP's pricing policy produced. Thus they commenced this action against WPP, alleging that its pricing policy constituted unlawful price discrimination in violation of §2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(a). The plaintiffs sought preliminary and permanent injunctive relief against WPP's pricing policy, as well as trebled damages for the losses which they sustained as a result of that policy.

The district court, pursuant to 28 U.S.C. §636, referred the matter to a magistrate, who conducted an evidentiary hearing to determine whether a preliminary injunction should be issued. The hearing lasted five days, after which the magistrate submitted his recommended ruling, including specific findings of fact. The district court "adopted, ratified and confirmed" the

recommended ruling and issued an order granting the preliminary injunction.

WPP appeals from that order, arguing that the district court lacked subject matter jurisdiction, that there was manifest error in the issuance of the injunction, and that the injunction as issued is too broad and should be modified. We find no merit in appellant's first two contentions, but agree that the relief granted was too broad and therefore modify the preliminary injunction and, as modified, affirm.

WPP contends that the district court lacked jurisdiction of the subject matter of this action because there was no proof of injury to competition. We of course must consider this argument although it was not raised below, *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880, 882 (2d Cir. 1970), *cert. denied*, 400 U.S. 993 (1971), as jurisdiction over the subject matter provides the basis for the court's power to act, and an action must be dismissed whenever it appears that the court lacks such jurisdiction. Fed. R. Civ. P. 12(h)(3).

WPP cites several cases from the Fifth Circuit for the proposition that proof of injury to competition is a jurisdictional requirement under the Robinson-Patman Act. This element was explicitly described as a prerequisite to jurisdiction in *Hampton v. Graff Vending Co.*, 516 F.2d 100, 101-02 (5th Cir. 1975), which relied on *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208 (5th Cir. 1969). In neither case, however, was the existence of an adverse effect on competition in issue. Moreover, the court in *Cliff Food Stores* did not speak in terms of jurisdiction, but rather in terms of the proof necessary to "maintain an action."[3]

We know of no other court which has adopted the position taken in *Hampton*. Commentators have concluded that proof of injury to competition is not a jurisdictional requirement. *See, e.g.*, 16B J. Von Kalinowski, *Business Organizations: Antitrust Laws and Trade Regulation*, ch. 23; Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 Yale L.J. 1155, 1156 (1958). We respectfully decline to follow the Fifth Circuit's dictum. Proof of injury to competition is not a jurisdictional prerequisite,

but instead is part of a Robinson-Patman plaintiff's substantive burden in demonstrating a violation of the Act.[4]

The district court applied the proper standard for the issuance of a preliminary injunction, requiring the plaintiffs to demonstrate "either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2 Cir. 1973). (Emphasis in original.) The court determined that the plaintiffs had satsified both prongs of this test. Our review is limited to a consideration of whether there was an abuse of discretion, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975), or a clear mistake of law, *414 Theater Corp. v. Murphy*, 499 F.2d 1155, 1159 (2d Cir. 1974), in the district court's application of the *Sonesta* test.

15 U.S.C. §13(a) requires a plaintiff to show that a defendant, (1) who was engaged in commerce, (2) has discriminated in price between purchasers of commodities (3) of like grade and quality, (4) where the effect may be substantially to lessen competition. WPP admitted that it was engaged in commerce and that the sales in question took place in commerce. The district court adopted the magistrate's findings of fact that the other three elements were also satisfied. We conclude that the district court acted well within its discretion in finding a probability that the plaintiffs ultimately will succeed on the merits of their claim.

Price discrimination, for the purposes of the Robinson-Patman Act, is "merely a price difference." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). WPP concededly charged different prices to different customers at the same time. The district court found that WPP was selling a commodity of like grade and quality in Waterbury and the Northwest Corner. In so finding, the court rejected as factually unsupported WPP's contention that the products sold in the two areas were different in that the price changed in

Waterbury purportedly included 24-hour burner service and easier credit terms, not offered in the Northwest Corner. The court also rejected WPP's defense that the price difference was justified by a difference in the costs of providing heating oil to the two areas. The court characterized the testimony of WPP's expert as "beyond the realm of believability" and concluded that WPP was operating at a loss in the Northwest Corner as a result of its lowered price. While we offer no opinion as to the eventual resolution of these issues, we find the district court's conclusions to be not clearly erroneous on the basis of the existing record.

The district court's conclusion on the issue of anti-competitive effect also is supported by the record. In this circuit, proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts to the defendant the burden of proving that its acts did not substantially lessen competition. *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). WPP did not discharge this burden. Injury to competition may also be shown by proof of predatory intent, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696-98, 702 (1967), which can be inferred from proof of sales below cost. *Id.*, at 696 n. 12. The district court's finding that WPP sold below cost was justifiable.

WPP argues that because it has only 2% of the Northwest Corner market and is not a powerful nationwide corporation, while the plaintiffs hold a much larger share of the market, there can be no anti-competitive effect of the kind contemplated by the Robinson-Patman Act. This contention runs counter to the language of *Utah Pie*, 386 U.S. at 702-03 n. 14, where the Supreme Court said:

> Nor does the fact that a local competitor has a major share of the market make him fair game for discriminatory price cutting free of Robinson-Patman Act proscriptions. "The Clayton Act proscription as to discrimination in price is not nullified merely because of a showing that the existing competition in a particular market had a major share of the sales of the product involved."

We next consider whether the plaintiffs demonstrated the possibility that irreparable injury would result if temporary injunctive relief were not granted. The district court found two elements of irreparable harm: (1) the "extreme likelihood" that Dutchess Auto Company ("Dutchess") would go out of business, and (2) the loss to "the goodwill and reputations" of the plaintiffs. Although we are not sure that we would have come to the same conclusion as did the district court, that is not the standard by which its determination must be judged. We cannot say that we have a "definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). We conclude that the finding of irreparable injury finds support in the record and relief based upon it did not constitute abuse of the court's discretion.

The district court determined that Dutchess was in danger of losing many customers to whom it had given discounts in an attempt to match WPP's price, and that, if it lost those customers, it would probably be forced out of the heating oil business. A threat to the continued existence of a business can constitute irreparable injury. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970). Although Dutchess might have done a more thorough job of proving the possibility that it would go out of business, we cannot say that the court's finding was without some evidentiary support.

The finding of irreparable harm through loss of goodwill and reputation raises a more difficult issue. WPP concedes that loss of goodwill in certain circumstances can constitute irreparable injury, as in *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969), and *Supermarket Services, Inc. v. Hartz Mountain Corp.*, 382 F. Supp. 1248 (S.D.N.Y. 1974). However, it contends on appeal that the loss of goodwill claimed here amounts to nothing more than a claim that the plaintiffs are losing customers to WPP's lower price. WPP argues that to issue a preliminary injunction on that basis would mandate a preliminary injunction in every price discrimination case, thereby destroying the preliminary injunction's status as an extraordinary remedy.

WPP's argument has considerable force. Those cases in which loss of goodwill previously has been held to constitute irreparable injury have involved the termination of franchise or distributorship relationships. *See, e.g., Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977); *Interphoto Corp. v. Minolta Corp., supra*, 417 F.2d 621; *Bergen Drug Co. v. Parke Davis & Co.*, 307 F.2d 725 (3d Cir. 1962); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 233 (D.N.J. 1976); *Supermarket Services, Inc. v. Hartz Mountain Corp., supra*, 382 F. Supp. 1248. In that situation, the plaintiff is deprived totally of the opportunity to sell an entire line of merchandise and may incur injury to its goodwill and reputation "as a dependable distributor which offers a full line" of goods. *Supermarket Services, Inc. v. Hartz Mountain Corp.*, 382 F. Supp. at 1256. That kind of loss of goodwill is quite different from the loss of a customer that results simply from a competitor's lower price. *Cf. Automatic Radio Manufacturing Co. v. Ford Motor Co.*, 390 F.2d 113, 116-17 (1st Cir.), *cert. denied*, 391 U.S. 914 (1968) (goodwill resulted from "mercurial market" geared to price and demand for personnel rather than from attractiveness of trade name). Every Robinson-Patman plaintiff must prove that the defendant's price discrimination has caused damage to him, *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969), and the most common form of damage to a plaintiff competing seller would likely be lost profits because of a loss of customers. We would have serious doubts about the wisdom or propriety of finding irreparable injury to exist every time that the defendant's lower price has attracted customers.

Here, however, WPP has waived the argument which it now seeks to raise on appeal. 28 U.S.C. §636(b)(1) provides that any party who objects to the magistrate's proposed findings and recommendations "may serve and file written objections...as provided by rules of court." The United States District Court for the District of Connecticut has adopted Rules for United States Magistrates. Rule 2 requires that "[a]ny party wishing to object must...serve on all parties, and

file with the Clerk, written objection which shall *specifically identify* the ruling, order, proposed findings and conclusions, or part thereof to which objection is made and the *factual and legal basis for such objection.*" (Emphasis added.) WPP objected to the magistrate's conclusion on the grounds that any loss of goodwill resulted from fair competition and that the scale of the alleged loss was too small to warrant preliminary injunctive relief.[5] WPP did not, however, "specifically identify the...legal basis" on which it now seeks to challenge the magistrate's conclusion. This failure to satisfy Rule 2 resulted in this argument not being considered by the district court and thus it has not been properly preserved for appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Wilkerson v. Weskill*, 501 F.2d 297, 298 (2d Cir. 1974).

Although we agree that the district court acted within its discretion in determining that a preliminary injunction should be granted, we believe that the injunction entered was too broad and should be modified. The plaintiffs' complaint sought relief restraining WPP from selling heating oil in the Northwest Corner at a price below that which it charged in Waterbury. The magistrate's recommended ruling proposed a preliminary injunction which would achieve that result by requiring WPP to charge the same price in both areas. The district court's order,[6] however, imposed a number of additional restrictions which exceeded the relief requested. The injunction prohibits WPP from granting any discounts which are not cost justified in either the Northwest Corner or Waterbury. None of the plaintiffs, however, competes with WPP in Waterbury, and no complaint has been made as to WPP's pricing policy there. "[A] decree cannot enjoin conduct about which there has been no complaint," *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1180 (3d Cir. 1976), nor may it "enjoin 'all possible breaches of the law.' " *Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945) (footnote omitted). Furthermore, the injunction's emphasis on allowing only cost justified discounts could be constructed to prohibit WPP from offering discounts in order to meet those offered by its competitors, all of whom concededly grant

discounts which may or may not be cost justified. The injunction therefore should be modified so as to regulate discounts only in the Northwest Corner and to make clear that WPP may engage in pricing policies that are allowed under the "meeting competition" defense afforded by 15 U.S.C. §13(b).[7] The burden of proving the justification for any discounts offered in order to meet competition will remain on WPP, as provided by the statute.

WPP also has attempted to raise two alleged evidentiary errors which it failed to preserve for our review because of its failure to include them in its objections to the recommended ruling. Because these issues are likely to arise again during the trial on the merits, we shall comment on them briefly. The first involved the admission as an exhibit of a list of customers whom plaintiff John B. Hull, Inc. allegedly lost to WPP. This exhibit presents a close question of admissibility even under the liberal criteria of Fed. R. Evid. 803(6), as it appears to be a list compiled under the special circumstances of WPP's price cut rather than a record kept as a "regular practice" of the plaintiff's business. The second objection concerned the qualifications of the plaintiffs' expert witness. The record suggests that he was adequately qualified to give expert testimony under Fed. R. Evid. 702. The weight to be given his testimony of course remains for the trier of fact to determine.

The order of the district court is modified and, as modified, is affirmed.

FOOTNOTES TO OPINION

1 The parties stipulated that the Northwest Corner includes the following locations: Sharon, Lakeville, Canaan, North Canaan, East Canaan, Salisbury, Falls Village, Norfolk, Lime Rock and Cornwall in the State of Connecticut; Millerton in the State of New York; and Great Barrington and Sheffield in the State of Massachusetts.

2 About twenty million gallons of heating oil are consumed annually in the Northwest Corner. The plaintiffs collectively sell more than ten million gallons of heating oil annually; however, it is not clear from the record what portion of those sales are made in the Northwest Corner. It is clear that the plaintiffs service a larger share of the market than does the defendant, Waterbury Petroleum Products, Inc.

3 The court said:

> To maintain an action under section 13(a) the plaintiff must allege and prove, inter alia: (1) That the defendant is engaged in commerce; (2) that, in the course of such commerce, the defendant has discriminated in price between different purchasers of commodities of like grade and quality; (3) that *"either or any of the purchases involved in such discrimination are in commerce"*; and (4) that there is likely to be a severe, adverse effect on competition.
>
> 417 F.2d at 208. (Emphasis in original.)

4 As the discussion below will show, the plaintiffs made a showing of probable effect on competition sufficient to satisfy any jurisdictional requirement, if one had existed.

5 The magistrate clearly found against WPP on the former ground. The latter ground might have weight if we were applying the "balancing of hardships" test, but it does not rebut the contention that a possibility of irreparable injury existed.

6 The injunction provided, in relevant part:

> It is therefore:
>
> ORDERED that the defendant, Waterbury Petroleum Products, Inc., shall establish a single price for sales of fuel oil Number 2. Nothing herein shall prohibit the defendant from granting discounts from such base price, so long as such discounts are cost justified.

Examples of such permissible cost justified discounts are discounts relating to tank size and annual volume consumed by the account (including multiple accounts). Any such discounts must be offered uniformly to all customers of Waterbury Petroleum Products, where ever located. Specifically, no discount shall be granted to any of Waterbury Petroleum Products' customers which purports to be for payment within a specified period of time or Waterbury Petroleum Products' non-provision of burner service. Nothing herein shall affect the prices which defendant shall charge its customers where such prices have been or will be hereafter established by contract following public competitive bidding. Subject to the foregoing, the prices which the defendant shall charge its customers for fuel oil Number 2 shall be solely a matter of defendant's business judgment. This injunction mandates full compliance with Section 2(a) of the Robinson-Patman Act on the part of Waterbury Petroleum Products, Inc....

7 The injunction shall be modified to read as follows:

It is therefore:

ORDERED that the defendant, Waterbury Petroleum Products, Inc., shall establish a single base price for sales of fuel oil Number 2. Nothing herein shall prohibit the defendant from granting discounts from base price, so long as any discounts given to customers in the Northwest Corner are cost justified. Examples of such permissible cost justification discounts are discounts relating to tank size and annual volume consumed by the account (including multiple accounts). No discount shall be granted to any of Waterbury Petroleum Products' customers in the Northwest Corner which purports to be for payment within a specified period of time or for Waterbury Petroleum Products' non-provision of burner service. Nothing herein shall affect the prices which defendant shall charge its customers where such prices have been or will be hereafter established by contract following public competitive bidding. Any conduct which is permissible under the "meeting competition" defense afforded by 15 U.S.C. §13(b) shall be permissible under the terms of this preliminary injunction, and shall not be deemed a violation thereof. Subject to the foregoing, the prices which the defendant shall charge its customers for fuel oil Number 2 shall be solely a matter of defendant's business judgment. This injunction mandates full compliance with Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act on the part of Waterbury Petroleum Products, Inc....

JUDGMENT

UNITED STATES COURT OF APPEALS
For The
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and seventy-eight

Present: HON. J. JOSEPH SMITH, HON. WILLIAM H. TIMBERS, HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judges,*

JOHN B. HULL, INC., THE SANDMEYER OIL COMPANY, COMMUNITY PETROLEUM PRODUCTS, INC., and DUTCHESS AUTO CO.,
Plaintiffs-Appellees

v.

WATERBURY PETROLEUM PRODUCTS, INC.,
Defendant-Appellant

78-7136
Filed Nov. 30, 1978
A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit (Seal)

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed, as modified, in accordance with the opinion of this court,

with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By: /s/ Arthur Heller
Deputy Clerk

RULING

Filed December 23, 1977 12:38 P.M.
Clerk, U.S. District Court, Hartford, CT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN B. HULL, INC.
THE SANDMEYER OIL COMPANY
COMMUNITY PETROLEUM
PRODUCTS, INC. and CIVIL NO. H-77-391
DUTCHESS AUTO CO.

V.

WATERBURY PETROLEUM
PRODUCTS, INC.

RECOMMENDED RULING ON MOTION FOR PRELIMINARY INJUNCTION

This case comes to the Court on an application for preliminary injunction enjoining the defendant, Waterbury Petroleum, Inc. (hereinafter referred to as W.P.P.), from continuing its pricing policy for Number 2 heating oil in the northwest corner market area. For the purpose of this lawsuit, the parties have stipulated that the northwest corner includes the following geographic locations: Sharon, Lakeville, Canaan, North Canaan,

East Canaan, Salisbury, Falls Village, Norfolk, Lime Rock and Cornwall in the State of Connecticut; the town of Millerton in the State of New York; and the towns of Great Barrington and Sheffield in the State of Massachusetts.

On August 14, 1975, W.P.P. purchased certain assets of the Canaan Oil Company in Canaan, Connecticut. After this acquisition, the Canaan Division of W.P.P. was managed by Jeffrey Smith and his son, and a driver, Mr. Castagna. In the spring of 1976, Ralph A. Devino, Vice President of W.P.P., had a falling-out with Smith and his son and they left W.P.P.'s employ. In July 1976, the driver Castagna, resigned and went to work for C.A. Lindell, a competitor of W.P.P. In leaving, the driver managed to get many of the customers of W.P.P. to shift their business to Lindell. As a result of the lost business, W.P.P. began in late September 1976, a new low price policy in which it advertised in the local papers a price of 35.9 cents per gallon for Number 2 fuel oil.[1]

The plaintiffs, who are all in the business of selling Number 2 heating oil, argue that the pricing policy of W.P.P. is a classic violation of Section 2a of the Clayton Act as amended by Section 2a of the Robinson-Patman Act, 15 U.S.C. 13(a). They claim that W.P.P. was engaged in commerce, sold a commodity of like grade and quality at discriminatory prices with a result in injury to competition within the meaning of the statute.

The defendant argues that this pricing plan was intended to re-establish the financial viability of the Canaan Division after its loss of customers due to its employment problems. It also argued that it was not selling a commodity of like grade and quality within the meaning of the act as it claims its product in Canaan was Number 2 oil and in Waterbury it was Number 2 oil plus service. This view was also expanded into an argument that it had not engaged in price discrimination as it was selling two different products. This is also the issue which it framed its subject-matter jurisdiction question around. The defendant further claims in fact, that it is enhancing competition, not injuring it, by presenting a lower price alternative to

customers of the northwest corner.

STATUTORY APPLICATION

The primary prohibition of Section 2a of the Robinson-Patman Act, 15 U.S.C. 13(a) (1970), makes it,

> "...unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them." 15 U.S.C. 13(a)

This prohibition is subject to various statutory defenses by the seller. If the seller can prove his low price is cost justified or is made in good faith to meet an equally low price of the competitor, then he can successfully rebut a prima facie case presented by the plaintiffs. In this case, the plaintiffs established the price discrimination of W.P.P. The element of price discrimination is established by merely showing the defendant has sold the same commodity to different customers at different prices. *Federal Trade Commission v. Anheuser-Bush, Inc.*, 363 U.S. 536, 549 (1960). As of September 23, 1977, the defendant was selling Number 2 oil at 48.9 cents in Waterbury and 39.9 cents in the northwest corner. Similar differences existed throughout the period in question.

The defendant's assertion that he is not involved in price discrimination of a commodity in commerce because the oil in the northwest corner is sold without the service and with stricter credit terms does not bear up under the facts.[2]

Several newspaper ads admitted as exhibits purport the defendant's product to be heating oil delivered with

24 hour service available.[3] The consuming public was led by the ads to think that the product and service was that which they ordinarily purchased from oil dealers. This, with the fact that the dominant nature of the product being sold in Waterbury and the northwest corner was Number 2 oil, leads this Court to the determination that the distinction made by the defendant is invalid. *General Shade Products Corporation v. Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); *Tri-State Broadcasting Co., Inc. v. United Press International*, 369 F.2d 268, 270 (5th Cir. 1966).

What the defendant tried to do was make a distinction between the product sold in the Waterbury area and the product sold in the northwest corner. What they did in fact, was make a distinction without a difference. With the requisite price discrimination established, the Court is left with the questions as to (1) whether any of the statutory defenses are applicable, and (2) whether the effect of such discrimination "may be substantially to lessen competition."

STATUTORY DEFENSES

The statutory defense of a good faith meeting of a competitor's price was not raised by the defendant. 15 U.S.C. 13(b). It was not an issue in the case at hand as the argued purpose of the pricing policy of W.P.P. was to regain the lost customers who went with the dismissed employees to the Lindell Company, thus re-establishing the financial viability of W.P.P.'s Canaan Division.[4]

The statutory defense of cost justification, 15 U.S.C. 13(a), is what the defendant used to try to legitimize its pricing policies. The Court does not feel that the defendant sustained its burden of proof on the defense. *Utah Pie Co. v. Continental Baking Co.*, 87 S.Ct. 1326, 386, U.S. 685, 18 L.Ed. 2d 406, *rehearing denied*, 87 S.Ct. 2071, 387 U.S. 949, 18 L.Ed. 2d 1340 (1967).

Defense expert, Barry Cohen, a C.P.A. whose firm had been employed by W.P.P. for 24 years, testified as to this cost justification issue. Mr. Cohen testified that W.P.P. had sold 4,500,000 gallons of oil at 48.9 cents in Waterbury and lost money, but had made money selling only 500,000 gallons of oil at 39.9 cents in the northwest corner. The Court differs with Mr. Cohen's conclusions. His study was done with incomplete information. His application of common accounting principles, such as figuring in depreciation when determining the profitability of the Canaan Division, was noticeably lacking. The Court also views Mr. Cohen's allocation of expenses attributed to the Canaan Division as beyond the realm of believability. If Mr. Cohen had made reasonable allocations of expenses, employed basic accounting principles as they should be, and verified all of the information personally rather than depending on W.P.P. and bank officials, this Court concludes that he would have found W.P.P. to be in a loss position in the northwest corner and not showing a $2,100 profit, as he testified to.[5] This conclusion is quite reasonable in light of the $160,000 loss shown for the last fiscal year by W.P.P. The statutory defense of cost justification was clearly not met by W.P.P., even when isolating the Canaan Division from the rest of W.P.P.'s operation.

ANTI-COMPETITIVE EFFECT

The unique rule in this Circuit is that, once a plaintiff has shown discrimination in pricing, the burden of proving the lack of requisite anti-competitive intent shifts to the defendant. *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 F.2d 378, 379 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). The harshness of the Moss Rule has been effectively limited as "there is no presumption that the proscribed discrimination in price has caused damage to the plaintiff. The burden of proving such damage is always on the plaintiff." *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457, 460 (2d Cir. 1957), *cert. denied*, 353 U.S. 965 (1957); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp.

345, 353 (E.D. N.Y. 1960). In the present case, the plaintiff has sustained his burden of proving a violation of Section 2(a) of the Robinson-Patman Act. The facts clearly show that W.P.P. was engaged in price discrimination in the sale of Number 2 heating oil. The statutory defenses of such actions were not met by W.P.P. and the Court feels that the requisite statutory effect on competition is there.

The question of the effect on competition needed to be in violation of 2(a) of the Robinson-Patman Act is best exemplified by *Utah Pie, supra.* The Supreme Court, speaking through Justice White, discussed the 2(a) violation of Continental Baking Company as well as the Carnation Company and the Pet Company. The Continental violation is particularly analogous to the case at hand.

Continental's market share of frozen pies in the Utah market ranged between 1.3% and 2.9% from 1958 through 1960. In order to pick up its market share it lowered its price of 22 ounce frozen pies to $2.85 per dozen while it was selling the same pie at substantially higher prices in other markets. The Utah area price was well below the cost of production for Continental. The Utah Pie Co., the plaintiff in that suit, who had the largest market share, at 45.3% in 1961, had to lower its prices in order not to lose customers to Continental. The Supreme Court found Continental's price discrimination as a violation of 2(a) even though Utah Pie's sales volume continued to climb through this period. The Court found that Utah Pie had to lower its price in response to Continental's price discrimination and this action in time would put Utah Pie in a financial pinch and eventually make Utah Pie a less effective competitive force. *Utah Pie, supra*, at 699-700.

The Court further elucidates its feelings toward price discrimination in footnote 14. (Utah Pie). They recognized that Continental's pricing policy arguably displayed only fierce competitive instincts. But, actual intent to injure a competitor does not fall into that desirable category. Furthermore, persistent sales below cost and radical price-cuts go beyond this fierce

competition when viewed in the context of the Robinson-Patman Act. The fact that a local competitor has a major share of the market *does not make him fair game for discriminatory price cutting free of Robinson-Patman Act proscriptions.*[6] (emphasis added)

In the instant case, W.P.P. holds about 2% of the market share in the northwest corner. They, for competitive purposes, sold Number 2 oil at about 9 cents per gallon less in the northwest corner than they did in Waterbury. Despite their assertions to the contrary, this price is below their cost of delivering the oil. The effect of this pricing policy was two fold. It diverted many customers of the plaintiffs to Waterbury. It also caused several of the plaintiffs to lower their prices to large commercial purchasers in order to keep from losing their business. The purpose of the price discrimination was to take customers away from the plaintiffs. While this in itself was not a violation of the Robinson-Patman Act, within the context of all the facts it becomes a violation, just as Continental Baking Company violated the Act in Utah Pie. It seems clear that W.P.P.'s price discrimination had the requisite effect on competition to be in violation of section 2(a) of the Robinson-Patman Act.

A finding of predatory intent is another way in which the Supreme Court has shown injury to competition. *Federal Trade Commission v. Anheuser-Bush, Inc.*, 363 U.S. 536, 549 (1960); *Utah Pie Co., v. Continental Baking Co.*, 386 U.S. 685, 702 (1967). In this case Mr. Devino said W.P.P. began its pricing policy to get back the 180 customers that left with Mr. Castagna.[7] The newspaper ads referred to never discussed the "discount chargeback" billing policy of W.P.P. The delivery tickets discussed infra at footnote 11, state payment in 10 days while the ads stated 30 day credit terms. In other words, Mr. Devino's stated desire to get back customers combined with the incidences of advertising and billing practices which are at the very least misleading, provides the same sort of predatory intent as another found in *E.B. Muller & Co. v. Federal Trade Commission*, 142 F.2d 511, 517 (6th Cir. 1944). There the defendant disparaged a

competitor's product and made false representations about his own product. Here, the defendant kept the full terms of his discount policy from the public, essentially leading them to think they would be getting the same type of delivery and service and billing that they were accustomed to. It is quite fair to infer predatory intent, thus, injury to competition from the aforementioned misleading advertising.

PRELIMINARY INJUNCTION STANDARDS

In this Circuit, a preliminary injunction will issue "only upon a clear showing of either (1) probable success on the merits *and* possible irreparable harm, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973). (Emphasis in original). This standard is applied by the Courts in this Circuit knowing that a preliminary injunction is an extraordinary remedy. *Gulf and Western Industries v. The Great Atlantic and Pacific Tea Company, Inc.*, 476 F.2d 687, 692 (2d Cir. 1973); *Checkers Motors Corp. v. Chrysler Corp.*, 405 F.2d 319 (2d Cir.) *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed. 777 (1969).

PROBABILITY OF SUCCESS ON THE MERITS

The anti-trust claim upon which the plaintiffs rely in the hearing was an alleged violation of Section 2a of the Robinson-Patman Act (15 U.S.C. 13(a)) which provides that it is:

> "unlawful for any person engaged in commerce...to discriminate in price between different purchasers of commodities of like grade and quality...where the effect of such discrimination may be sub-

stantially to lessen competition or tend to create a monopoly in any line of commerce or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them..."

In the instant case, after five days of hearings, the following findings of facts were made:

1. W.P.P. was engaged in selling Number 2 heating oil in commerce at two different prices in two different market areas. This is price discrimination. *Federal Trade Commission v. Anheuser-Bush, Inc., supra.*

2. The commodity Number 2 heating oil was a commodity of like grade and quality within the meaning of the statute. Defendant's assertions to the contrary were not born out by the facts.

3. Defendant's assertion of cost justification, which was coupled with its like grade and quality argument, is not supported by the facts. The separation of the Canaan operation from the Waterbury operation was a fiction. It did not take into consideration the dependence of the Canaan operation on the physical operations of Waterbury and the manpower at Waterbury.

A. The cost savings claimed by the different means of supplying 24 hour service (subcontracting versus in house shop) were not established to this Court's satisfaction.

B. Neither were the cost savings attributed to the short term credit arrangement in the northwest corner versus Waterbury. The reality of the Canaan Division of Waterbury is that it appears to be little more than a route of the parent company and the cost of the product delivered must be measured with this in mind.

4. The element of injury to competition was established by analogizing the instant case to *Utah Pie.* The defendant's discriminatory pricing policy caused the plaintiffs to lose customers, many of them being customers of long standing.[8] It also caused the

plaintiffs to lower prices to bulk commercial customers in order to keep from losing these large accounts.

While courts do not usually speak to likelihood of success on a preliminary hearing, this Court will in this instance. Five days of hearings presented this Court with detailed evidence about the circumstances surrounding this suit. The plaintiffs' Motion for Consolidation pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, was denied due to the defendant's request.[9] Then, the defendant's counsel in his closing arguments at the hearing claimed that he had made an attempt to have consolidation of the preliminary and final hearings and that the plaintiffs rejected this. The defendant's confusion as to this matter only highlights its realization that by the end of the five days of hearings both sides had developed their cases well beyond that which is normally done in preliminary hearings. It is this reason that the Court feels that it can speak affirmatively on the plaintiffs' probable success on the merits and make, with confidence, those determination of facts and law listed above.

IRREPARABLE INJURY

Of equal importance to probable success on the merits is a showing of irreparable harm which is "fundamental and traditional requirement of all preliminary injunctive relief." *Triebwasser & Katz v. American Telephone and Telegraph Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976). Plaintiffs offered unrefuted facts that because of the price discrimination of W.P.P., they will lose customers and sustain damage as a result of these lost customers. In one case (Dutchess Auto), a company will be forced out of the oil business completely. All will suffer irreparable damage to goodwill and their reputations. In order to grant this injunction, given the customary latitude allowed anti-trust plaintiffs in establishing their damages, the alleged damages must be beyond monetary

calculations. *Triebwasser & Katz, supra*, at 1359. As Triebwasser & Katz pointed out, this determination is hard to reach, but, in the instant case, the facts show two particular strong elements of irreparable harm:

1. The extreme likelihood that Dutchess Auto will go out of the oil business due to W.P.P.'s price discrimination policy, and
2. The loss to the goodwill and reputations to these local businessmen who are dealing in a small town business atmosphere.

The first instance of irreparable harm is to Dutchess Auto who has already lost many customers. Dutchess is in jeopardy of losing many more customers to whom it gave discounts to keep them. Dutchess will probably be forced out of the oil business if the present pattern continues. Even if money damages would suffice to remedy Dutchess Auto's losses, the Second Circuit has ruled that a threat to the existence of a business is irreparable injury. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970). Here, while Dutchess would not be forced completely out of business, (it sells cars and gasoline also) it would be forced out of the oil business and this factor combined with the probability that the plaintiffs will succeed on the merits, leads this Court to rule the damages here to be irreparable in the same manner that they were irreparable in *Semmes Motors, supra.* Dutchess Auto is being forced out of a line of commerce due to the defendant's discriminatory pricing policy.

While the Court views the irreparable harm to Dutchess Auto as enough to justify an injunction, the irreparable harm measured by the loss of goodwill and reputation to the local merchants is just as strong. The Second Circuit recognizes that the loss of goodwill is irreparable. *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969). In the instant case we are dealing with oil companies who are selling their product to many small towns in a very large geographical area. Many of the customers of the plaintiffs are of long standing and have accepted the produce, price,

and service of the plaintiff as fair and reliable. Now, the defendant, through a discriminatory pricing policy has shaken the confidence of these customers in the plaintiffs' business practices. New customers coming to the area will ignore the plaintiffs and go for the defendant's price. This loss cannot be measured. *Supermarket Services, Inc. v. Hartz Mountain Corp.*, 382 F. Supp. 1248 (S.D. N.Y. 1974). The loss of goodwill itself is manifested by the evidence that many of the customers lost to W.P.P. were of very long standing-one, as long as forty five years.[10]

The defendant reminded the Court that the public interest should be "paramount" and "kept foremost in mind". *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., supra* at 693. The defendant then goes on and claims that the public interest would be impaired by the raising of the price of fuel oil in the northwest corner, thus throttling the very competition that the anti-trust laws were designed to protect. It is here that the defendant has misinterpreted what the public interest is and as well as the full intent of the Robinson-Patman Act.

Defendant, in his newspaper ads and his billing practices was clearly not acting in the public interest. The ads were misleading because they led the public to believe that there was a discount price available for the oil. But, the terms of payment and the backbilling techniques were totally unclear to the consumer. The ads spoke of 30 day payment periods, while the delivery tickets uniformly stated, "payment in ten days."[11] The price that customers would pay for oil if not paid within this unclear payment period was never revealed in the ads. If it had been, it is quite possible that some of those customers might not have been interested in switching their business at all. Also, the ads purported to offer 24 hour burner service.[12] W.P.P., in this proceeding, contradicted that by saying the price of oil did not include the increment of cost alloted for service. True, W.P.P. subcontracted their service, but the public was not informed of that in their ads. The public was also never informed of the 44.9 cents price if payment was not rendered within 30

days.[13] The public interest was clearly not being served by W.P.P.'s misleading advertising and billing techniques.

The defendant's misinterpretation of the competitive aspects of the anti-trust laws is manifested by his misinterpretation of the public interest as shown above. The Robinson-Patman Act, Section 2(a), has the purpose of requiring a standard of fair competition when it comes to the area of price competition. This is the Robinson-Patman Act proscription discussed by Justice White in footnote 14 of *Utah Pie*. Underlying this is the view that unbridled competition in the area of price competition can produce more ills than benefits to society. This is manifested by the actions of the defendant discussed above which are clearly against the public interest. While the Robinson-Patman Act Section 2(a) does not purport to protect those already established in a market, it does set a standard of behavior that must be met in the realm of price competition, i.e., the requirement of one price for a commodity of like grade and quality sold in interstate commerce. This Court recognizes the criticism of this point of view as noted in footnote 6 of this decision, but the misleading business practices that accompanied these discriminatory prices clearly speak to the benefits that the Robinson-Patman Act are trying to bring to society, i.e., fair business practices.

STATUS QUO

It also should be noted that the normal function of the preliminary injunction is to maintain the status quo pending full hearing on the merits. *SCM Corp. v. Xerox Corp.*, 507 F.2d 358, 361 (2d Cir. 1974); *Checkers Motor Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.) *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969); 7 J. Moore Federal Practice 65.04 (1), at 65-36 and n.3 (2d Ed. 1975). Granting the injunction will in effect give the plaintiffs a portion of the ultimate relief they seek, i.e., an end to W.P.P.'s dual pricing policy. It will also put W.P.P. back in "the

last uncontested status which proceeded the pending controversy."

Thus, in applying the *Sonesta* test in the present case, this Court finds all prongs of the test satisfied. Because of the luxury of five days of hearings, this Court was presented with a multitude of evidence which allows it to find a clear showing of probable success on the merits *and* the possible irreparable injury. As well as that, there are clearly sufficiently serious questions going to the merits to make them a fair ground for litigation with a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

A preliminary injunction will issue as follows:

Enjoining Waterbury Petroleum Products, Inc. from maintaining a discriminatory pricing policy in the sale of Number 2 heating oil. Specifically, Waterbury Petroleum must charge the same price for Number 2 heating oil in the northwest corner as in Waterbury, regardless of its present credit terms and how service is presently being provided to its customers. The determination for that single price for Number 2 heating oil is clearly a business decision left to the management of Waterbury Petroleum Products, Inc. This injunction mandates compliance with Section 2(a) of the Robinson-Patman Act on the part of Waterbury Petroleum Products, Inc. No bond or other security to secure compliance and damages shall be required of the plaintiffs or defendant.

Dated at Hartford, Connecticut, this 23rd day of December, 1977.

F. Owen Eagan
United States Magistrate

"The foregoing findings of the magistrate are hereby adopted, ratified and confirmed. An appropriate injunctive order shall be settled within (5) days."

So Ordered.

T. Emmet Clarie, U.S.D.J.

FOOTNOTES TO RULING

1. Exhibits A through II and PP (Newspaper Ads).

2. The defendant asserted that he was selling a self-service type product here, analogous to a self-service gas station. The price difference he claimed in delivery of such a product would correlate to the cost savings of the self-service produce. The legality of such a plan may be able to be shown in the future, given the proper facts to support it. Here, those facts are not present.

3. Exhibits A through U (Newspaper Advertisements), except Exhibit E covering the dates September 30, 1977 through February 17, 1977.

4. Transcript Tape 5 side 11.

5. The opinion presented by Mr. Cohen a Certified Public Accountant, was not a certified opinion based upon a certified audit, but this Court accepted it into evidence as being from one who has familiarity with numbers and the company involved. Mr. Cohen did not take any of the administrative costs of W.P.P. and make them attributable to Canaan. Mr. Cohen did not include overtime hours worked in Canaan by a driver in the costs allocated to his labor. Mr. Cohen made no allocation for rent to the Canaan bulk plant. He also made no allocation for legal fees.

6. Criticism of Section 2(a) of the Robinson-Patman Act has been wide spread. President Johnson appointed a Task Force on anti-trust policy in 1968. In its July 5, 1968 report, the Task Force criticized 2(a) as focusing "the attention of the Courts and enforcement agencies upon the individual competitors rather than the state of competition in the line of commerce affected. Efforts to preserve individual competitors sometimes seriously restricted the forces of competition. Furthermore, the Task Force viewed price flexibility as "an important aspect of competition, that discrimination is an important aspect of price flexibility, and that the benefits of price flexibility and discrimination should not be needlessly sacrificed." The Task Force suggested specific revision of the Robinson-Patman Act embodying these principles. This Court recognized this point of view, but is bound by the statute and the case law until the policy is changed by Congress.

FOOTNOTES TO RULING (Continued)

7. Ibid, n. 4.

8. See plaintiffs' Exhibits JJ and TT for plaintiffs' lost customers and defendant's customer list.

9. See defendant's memorandum in opposition to plaintiffs' Motion for Consolidation dated September 19, 1977, filed September 23, 1977.

10. Ibid, n. 8.

11. Exhibits EEE, AAA and DDD (Delivery Tickets).

12. Ibid, n. 3.

13. Ibid, n. 1.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1132

WATERBURY PETROLEUM PRODUCTS, INC.,

Petitioner,

v.

JOHN B. HULL, INC., THE SANDMEYER OIL COMPANY, COMMUNITY PETROLEUM PRODUCTS, INC., and DUTCHESS AUTO CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

I. Procedural Background 2

II. Factual Background 3

III. Injury to Competition 4

REASONS WHY THE WRIT SHOULD BE DENIED 5

I. No Extraordinary Circumstances Exist Requiring Review of a Preliminary Injunction in Advance of the Trial 6

II. Subject Matter Jurisdiction Does Not Depend Upon Injury to Competition 7

A. There Is Subject Matter Jurisdiction When Claim Is Under Federal Statute 7

B. There Is No Conflict Among the Circuits 8

III. Courts Below Correctly Found Injury to Competition 10

A. *Utah Pie* 10

B. The *Moss* Rule 11

CONCLUSION 12

APPENDIX 13

TABLE OF AUTHORITIES

Cases: PAGE

American Construction Co. v. *Jacksonville, Tampa & Key West Railway Co.*, 148 U.S. 372 (1893) 6

Automatic Canteen Co. v. *FTC*, 346 U.S. 61 (1953) 11, 12

Bell v. *Hood*, 327 U.S. 678 (1946) 7

Cliff Food Stores, Inc. v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969) 9

Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) 6

Ex parte Watkins, 7 Peters 568 (1833) 7

FTC v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960) 8, 11

FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948) 11, 12

Hagans v. *Lavine*, 415 U.S. 528 (1974) 7

Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251 (1916) 6

Hampton v. *Graff Vending Co.*, 478 F.2d 527 (5th Cir. 1973), *cert. denied*, 414 U.S. 859 (1973) 9

Hampton v. *Graff Vending Co.*, 516 F.2d 100 (5th Cir. 1975) 8, 9

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) 7

Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954) 11

Samuel H. Moss, Inc. v. *FTC*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945) 11, 12

The Fair v. *Kohler Die & Specialty Co.*, 228 U.S. 22 (1913) 7

United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 8

PAGE

United States v. *Price*, 361 U.S. 304 (1960) 8

Utah Pie Co. v. *Continental Baking Co.*, 386 U.S. 685 (1967) 10, 11

Statutes:

15 U.S.C. § 13(a) 2, 4, 13
15 U.S.C. § 15 7
15 U.S.C. § 26 7
28 U.S.C. § 636 2
28 U.S.C. § 1337 7

Other Authorities:

R. Stern & E. Gressman, *Supreme Court Practice* (5th Ed. 1978) 6

16B J. Von Kalinowski, *Business Organizations: Antitrust Laws and Trade Regulation* (1978) 8

Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155 (1958) 8

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OCTOBER TERM, 1978

No. 78-1132

WATERBURY PETROLEUM PRODUCTS, INC.,

Petitioner,

v.

JOHN B. HULL, INC., THE SANDMEYER OIL COMPANY, COMMUNITY PETROLEUM PRODUCTS, INC., and DUTCHESS AUTO CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, John B. Hull, Inc., The Sandmeyer Oil Company, Community Petroleum Products, Inc., and Dutchess Auto Co., respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 588 F.2d 24.

Questions Presented

Petitioner does not accurately set forth the questions presented. The actual questions presented are:

1. Should this Court consider whether injury to competition is an element of subject matter jurisdiction, where the complaint alleges a claim under the Robinson-Patman Act and the Court of Appeals found a sufficient showing of

injury to competition, even if it were a jurisdictional prerequisite?

2. Should this Court review, prior to trial, the sufficiency of proof of injury to competition?

Statute Involved

The petition involves Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (a), the text of which is reprinted in the appendix to this brief at pages 13-14.

STATEMENT OF THE CASE

I. Procedural Background

This case comes to the Court on a petition for writ of certiorari seeking review of a preliminary injunction.

The preliminary injunction simply mandates compliance with the Robinson-Patman Act, 15 U.S.C. § 13(a). It was issued after a five-day evidentiary hearing before a United States Magistrate. Seven witnesses testified, and sixty-nine exhibits were received into evidence. At the conclusion of the hearing, and after consideration of numerous legal memoranda, the Magistrate recommended the issuance of a preliminary injunction. (A 14-27).*

Upon the motion of Petitioner, pursuant to 28 U.S.C. § 636, there was a *de novo* review by the District Court of the proceedings before the Magistrate. The District Court "adopted, ratified and confirmed" the Magistrate's recommended ruling. (A 27). A preliminary injunction was thereafter issued.

* References in this form are to the Appendix to Petition for a Writ of Certiorari.

The Court of Appeals for the Second Circuit unanimously affirmed the order of the District Court with modifications. The modifications are irrelevant to the issues raised in the petition.

Throughout the proceedings, the parties actively engaged in discovery. Trial preparation is almost complete.

II. Factual Background

Respondents sell heating oil in certain contiguous areas of Connecticut, New York and Massachusetts which have been collectively referred to as the Northwest Corner. Respondents' annual sales of petroleum products range from $500,000 to $2,900,000.

Petitioner is a substantial, well-established petroleum business with annual sales of almost $4,000,000 in 1976. It sells heating oil in two separate and geographically distinct markets: Waterbury, Connecticut, and the Northwest Corner. Petitioner competes against each Respondent in the Northwest Corner.

Prior to September, 1976, Petitioner sold heating oil at the same price in both markets. Its business was profitable. In September, 1976, Petitioner substantially reduced its price for heating oil in the Northwest Corner, but did not reduce its price in Waterbury. During the following heating season, Petitioner raised its Waterbury price eight cents per gallon, but only raised its Northwest Corner price four cents per gallon. Its Northwest Corner price was below cost. During that season Petitioner lost over $160,000.

Petitioner's drastic and prolonged price cuts caused widespread diversion of customers in the Northwest Corner. Within two months Petitioner more than doubled the number of its Northwest Corner customers. However, it continued to increase the size of its discounts in the North-

west Corner, while granting no such discounts in Waterbury. Simultaneously, Petitioner commenced a disparaging advertising campaign which demeaned competitors in the Northwest Corner and withheld from customers the full terms of sale. The District Court found these practices were "at the very least misleading." (A 20).

After it became clear that Petitioner's actions would persist, Respondents commenced this action under the Robinson-Patman Act, 15 U.S.C. § 13(a), and moved for a preliminary injunction.

As the Magistrate's recommended ruling meticulously points out, Respondents proved each element of a Robinson-Patman Act violation. Petitioner's only witness was called as an expert to show that the discounts were cost justified. This testimony was found "beyond the realm of believability." (A 18).

The Magistrate noted that the unusually extensive preliminary injunction hearing permitted the court to conclude "with confidence" that Respondents will probably succeed on the merits. (A 23). The District Court and the Court of Appeals endorsed the Magistrate's conclusion.

III. Injury to Competition

The petition only challenges the decisions of the courts below on a single issue: whether Respondents proved "injury to competition." The proof of injury to competition was overwhelming.

The District Court based its finding of competitive injury on the following grounds:

1. Respondents proved price discrimination, but Petitioner failed to establish any statutory defense. (A 19).

2. Petitioner was selling below cost, from which the court inferred predatory intent. (A 20, 22).

3. Petitioner's persistent sales below cost and radical price-cuts went beyond permissible "fierce" competition. (A 19-20).

4. Respondents lost many customers to Petitioner, and were forced to lower prices to large commercial customers to keep from losing them. (A 20, 22-23).

5. Petitioner's diversion of customers "combined with incidents of advertising and billing which [were] at the very least misleading proved . . . predatory intent." (A 20-21).

The Court of Appeals found a sufficient showing of injury to competition after considering only two of the District Court's findings. (A 6).

Reasons Why the Writ Should Be Denied

1. The interlocutory decisions of the courts below simply mandate compliance with the Robinson-Patman Act.*

2. The decisions of the courts below properly applied well recognized and controlling precedents. The petition requests this Court, prior to trial, to overrule *and* significantly modify two decisions relied upon by the Court of Appeals.

3. Petitioner's price discrimination was motivated by anti-competitive reasons. Therefore, any decision of this Court is unlikely to affect the outcome of the case.

---

* Petitioner erroneously contends that the injunction requires it to raise and fix prices. The injunction provides, in part:

"The prices which [Petitioner] shall charge its customers for fuel oil Number 2 shall be solely a matter of [its] business judgment." (A 12).

4. Generally, this Court's review of preliminary injunctions is limited to whether the issuance of the injunction was an abuse of discretion. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). No abuse of discretion is asserted in the petition.

5. Petitioner is not harmed in any way by the injunction, and the petition asserts no harm.

6. The legal positions advanced by Petitioner are unsound.

I.

No Extraordinary Circumstances Exist Requiring Review of a Preliminary Injunction in Advance of the Trial.

Even assuming there were merit to the points raised by the petition, review by this Court is premature.

This Court customarily declines to review a nonfinal order because the facts of the case are not developed or resolved prior to the trial. *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway Co.*, 148 U.S. 372, 384 (1893). *See also Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (lack of finality "of itself furnished sufficient ground for the denial"); R. Stern & E. Gressman, *Supreme Court Practice*, 300 (5th Ed. 1978).

The only reason offered for this Court's review at this time is the assertion that there is a "crisis in the price of fuel oil" which, together with "the pressure of inflation" is so extraordinary as to "demand an immediate hearing." This argument is misconceived, since the injunction permits Petitioner to set its prices solely as a matter of its business judgment. (A 12). Furthermore, it cannot be seriously urged that any decision in this case will affect either the price of petroleum or inflation.

II.

Subject Matter Jurisdiction Does Not Depend Upon Injury to Competition.

A. Federal Courts Have Subject Matter Jurisdiction of a Claim Under a Federal Statute.

This Court has consistently held that when a claim is based upon violation of a federal statute, federal courts have subject matter jurisdiction. *Hagans* v. *Lavine*, 415 U.S. 528, 537-38 (1974); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). *See Ex parte Watkins*, 7 Peters 568, 571 (1833).

The Complaint alleges jurisdiction pursuant to 28 U.S.C. § 1337 and 15 U.S.C. §§ 15 and 26. Petitioner admitted the action satisfied the commerce requirements of the Robinson-Patman Act. (A 5). The courts below found that Respondents demonstrated probable success on the merits. (A 5, 27).

The Court of Appeals correctly held: "Proof of injury to competition is not a jurisdictional prerequisite, but instead is part of a Robinson-Patman plaintiff's substantive burden in demonstrating a violation of the Act." (A 4-5). Additionally, the Court of Appeals noted that even if injury to competition were jurisdictional, Respondents had made a sufficient showing. (A 11).

Section 2(a) prohibits price discrimination where, *inter alia*, "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition . . . ." This Court described this statutory language as one of "the conditions which make a price difference legal or illegal." *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 550 (1960).

Commentators also have concluded that proof of competitive injury is not a jurisdictional requirement. *See, e.g.*, 16B J. Von Kalinowski, *Business Organization: Antitrust Laws and Trade Regulation*, ch. 23 (1978); Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155, 1156 (1958).

Petitioner claims that the legislative history of the Robinson-Patman Act suggests that competitive injury is an element of subject matter jurisdiction. The only "legislative history" Petitioner cites is a casual comment made in a 1976 Committee Report of the House of Representatives. This Court has pointed out on previous occasions that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). *See United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349 (1963).

B. There Is No Conflict Among the Circuits.

Petitioner mistakenly relies upon a Fifth Circuit decision to support its argument that there is a conflict among the circuits on the jurisdictional requirements of the Robinson-Patman Act. *Hampton* v. *Graff Vending Co.*, 516 F.2d 100 (5th Cir. 1975) did not hold that proof of injury to competition was a jurisdictional prerequisite under the Robinson-Patman Act. The only issue on that appeal was whether

"Hampton has failed to prove at least one purchase or sale [was] 'in commerce'." *Supra* at 101.

In an earlier appeal, in the same case, the issue before the Fifth Circuit was whether the price discriminations "have the effect of substantially lessening competition." *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 529 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973). In this first appeal injury to competition was characterized as one of the "elements" of a Robinson-Patman Act claim. 478 F.2d at 532.

Petitioner also relies upon *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969). However, in that case the Fifth Circuit said: "To maintain an action under section 13(a) the plaintiff must *allege and prove*" four statutory elements, including injury to competition. *Supra* at 208 (emphasis added).

In the second *Hampton* appeal, the Fifth Circuit relied upon the decision in *Cliff Foods*, and quoted verbatim the four elements of a Robinson-Patman Act claim. However, the second *Hampton* decision modified the language of *Cliff Foods* and characterized the four statutory elements as jurisdictional. This change in language was unexplained and probably inadvertent. There is nothing in the second *Hampton* opinion which indicates that the Fifth Circuit intended to change the jurisdictional requirements of the Robinson-Patman Act.

In any event, the issue is unimportant in this case. The Court of Appeals found that Respondents made a showing "sufficient to satisfy any jurisdictional requirement, if one had existed." (A 11). This interlocutory appeal from the Second Circuit is not the appropriate case for harmonizing the language of decisions of the Fifth Circuit.

III.

Courts Below Correctly Found Injury to Competition.

The District Court cited numerous factors to support its findings of injury to competition. Petitioner challenges only two of these factors in this Court. The other factors remain unchallenged and are alone sufficient to support a finding of competitive injury.

A. *Utah Pie*

Petitioner contends that the courts below improperly relied upon *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967). *Utah Pie* holds that injury to competition may be shown by predatory intent, which can be inferred from proof of below cost sales.

Petitioner concedes that it sold heating oil at below cost in the Northwest Corner. However, it urges that the inference of predatory intent should not be applied to it because it does not possess "huge economic power, huge marketing divisions and huge capital" and there was no showing of inequality of economic power.

The distinction urged by Petitioner is without foundation and would be unsound as a matter of antitrust policy. Furthermore, it would be inadvisable for this Court to consider complex economic distinctions until the facts have been fully developed at trial.

There is no basis in the language of the Robinson-Patman Act, or the decided cases, for the distinction urged by Petitioner. Price discrimination by "any person" is unlawful.

The inference of predatory intent from persistent below cost pricing is sound doctrine in antitrust law. *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 696 n.12, 702 n.14 (1967); *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960); *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 120 (1954).

Even if Petitioner's argument had merit, resolution of the issue would not change the result here. Petitioner's claim that it lacks economic power has no basis in this record. Petitioner's 1976 sales were $1,000,000 greater than the sales of any Respondent and over seven times greater than the petroleum sales of one Respondent. Petitioner advertised that it could offer prices lower than its competitors because of its buying power and superior storage and delivery capacity.

B. The *Moss* Rule

For the first time, Petitioner contends that the courts below should not have relied upon *Samuel H. Moss, Inc.* v. *FTC*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). *Moss* provides that proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts to the defendant the burden of establishing that its acts did not substantially lessen competition. *Supra* at 379.

Nothing turns on Petitioner's argument since, with or without the *Moss* presumption, Respondents fully satisfied their burden of proving competitive injury. Furthermore, this Court has cited *Moss* with approval in three price discrimination cases. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 n.15 (1960); *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 79 n.23 (1953); *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 45 n.13 (1948). In *Morton Salt*, a secondary line price discrimination case, this Court held that a presumption of

injury to competition arises where a manufacturer sells its product to customers at discriminatory prices. 334 U.S. at 50. In *Automatic Canteen,* this Court approved the *Moss* policy of shifting the burden of proof to the party which has at its "peculiar command" the information at issue. 346 U.S. at 79.

The courts below properly relied upon the *Moss* rule. *Moss* is a rule of procedural convenience. It is particularly appropriate to shift the burden of proof on the issue of competitive injury to the defendant in a preliminary injunction proceeding. At that preliminary stage of the case, where the plaintiff has had only limited discovery, the defendant has "peculiar command" of why he is discriminating in price and the impact of such pricing.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: Stamford, Connecticut
February 15, 1979

APPENDIX

Statute Involved

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit

differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.